IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 4510 OF 2005

VISHNU RAMCHANDKRA UNDAGE .. PETITIONER

Vs.

GANPATI RAMCHANDRA UNDAGE & ORS... RESPONDENTS

Mr. M.S. Lagu for petitioner

Mr. S. V. Kurade for respondent-1

Respondents 2 & 3 are served

CORAM: SMT. RANJANA DESAI, J.
30/9/2005

ORAL JUDGMENT:-

. Rule. By consent of the parties taken up for hearing forthwith.

2. Respondent 1 filed R.C.S. No. 7/94 in the court of C.J.J.D. Ajra against one Ramchandra Undage original defendant 1, Kondubai Undage, original defendant 2, Vishnu Undage original defendant 3, and the petitioner herein for partition and separate possession of his share claiming that the suit properties are ancestral properties and he has one fourth share therein. For the sake of convenience parties are referred to in this judgment as per their

status in the trial court.

3. At the trial defendant 3 remained absent. The suit proceeded ex parte against him. Defendants 1 and 2 filed their written statement . It appears that during the pendency of the suit defendant 2 died and in her place defendants 2(1) & 2(2) were brought on record.

4. On 29/4/2000 the suit was partly decreed. It was declared that the plaintiff, defendant 1, defendant 3 are having 6/20th share each and defendant 2(1) and 2(2) are having 1/20th share each in the suit properties. It was directed that partition of landed properties be effected by metes and bounds through the Collector of the district as per Section 54 of the Civil procedure Code. Preliminary decree was ordered to be drawn accordingly.

5. Thereafter defendant 1 Ramchandra Undage died on 2/10/2000. It is the case of the petitioner/defendant 3 that deceased Ramchandra had executed a registered will dated 16/8/96 under which he had bequeathed his share to him. The petitioner/defendant 3, therefore, made application Exh.-1 in Regular Darkhast No. 80/02 inter alia praying that he may be allotted share of the deceased father in pursuance of the registered will dated 2/10/00 executed by his father. The

executing court held that there is no compliance of Section 213 of the Indian Succession Act, 1925, which requires that no right can be established in any court of justice unless a court of competent jurisdiction grants probate of the will under which the right is claimed. Since there is no probate the petitioner cannot claim under the will. The court also held that legality of the will cannot be decided under Section 47 of the Code of Civil Procedure. The executing court, therefore, rejected the petitioner's application and hence this writ petition.

6. I have heard the learned counsel for the petitioner/defendant 3. I have heard the learned counsel for respondent 1-plaintiff.

7. Mr. Lagu appearing for the petitioner contended that the executing court erred in rejecting his application. He submitted that the will was executed in Kolhapur in respect of property which does not fall in the limits of area covered by the ordinary original jurisdiction of this court and therefore, it is not covered by Section 213 of the Indian Succession Act, 1925. Hence there was no question of obtaining any probate for the said will. He submitted that the executing court also misconstrued and misinterpreted the provisions of Section 47 of the Code of Civil Procedure.

8. In support of his submission, the learned counsel relied on Kantabai Mahipal Sonavane v. Nimba Onkar Patil, 2000(1) Bom. C.R. 417, Bhagwanji Karsanbhai Rathod v. Surajmal Anandraj Mehta, 2003(5) Bom. C.R. 228 and Prabhakar Chinappa Chavan v. State of Maharashtra, 2004 (Supp. 2) Bom. C.R. 737.

9. I have also heard the learned counsel for respondent 1 at great length.

10. In my opinion, the executing court erred in holding that the present will is covered by Section 213 of the Indian Succession Act. Section 213 of the Indian Succession Act sofar as it is relevant for the present case reads as under:

. "S. 213. Right as executor or legatee when established. - (1) No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in (India) has granted probate of the Will under which the right is claimed, or has granted letters of administration with the Will or with a copy of an unauthenticated copy of the Will annexed."

(2) This section shall not apply in the case of Wills made by Muhammadans (or Indian Christians), or and

shall only apply-

(i) in the case of Wills made by an Hindu, Buddhist, Sikh or Jaina where such Wills are of the classes specified in clauses (a) and (b) of section 57; and

(ii) . . . . . .

11. Bare reading of Section 231(2) indicates that the requirement of probate will apply to the whills covered by Section 213 (2) (i) & (ii). In this connection it is also necessary to have a look at Section 57 of the Indian Succession Act. Section 57 reads thus;

. "S. 57. Application for certain provisions of Part to a class of Wills made by Hindus, etc. - The provisions of this Part which are set out in Schedule III shall, subject to the restrictions and modifications specified therein, apply -

(a) to all Wills and codicils made by any Hindu, Buddhist, Sikh or Jaina on or after the first day of September, 1870, within the territories which at the said date were subject to the Lieutenant-Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay; and

(b) to all such Wills and codicils made outside those territories and limits so far as relates to immoveable property situate within those territories or limits; and

(c) to all Wills and codicils made by any Hindu, Buddhist, Sikh or Jaina on or after the first day of January, 1927, to which those provisions are not applied by clauses (a) and (b);

Provided that marriage shall not revoke any such Will or codicil.

12. A conjoint reading of these two sections indicate that ordinarily no right as executor or legatee can be established unless a court of competent jurisdiction grants probate of the will. However, this requirement is not present in the case of wills made by Muslims or Indian Christians. But it applies in cases of wills made by Hindus where such wills are covered by clauses (a) and (b) of Section 57. Those wills which fall outside clauses (a) and (b) of Section 57 will not require probate.

13. Clause (a) covers cases of wills or codicils made by any Hindu, Buddhist, Sikh or Jain on or after 1/9/1870 within the territories which at the said date

were within the local limits of the ordinary original civil jurisdiction of this court. Clause (b) covers cases where wills and codicils are made outside the local limits of the ordinary original civil jurisdiction of this court so far as they relate to immovable property situate within the said limits i.e. the limits of the ordinary original civil jurisdiction of this court. Therefore, wills in respect of property situate outside the limits of the ordinary original civil jurisdiction of this court would not require probate.

14. Since in this case the will dated 16/8/96 is made at Kolhapur, in respect of property situate at Kolhapur, there is no need to obtain probate because Kolhapur does not fall within the ordinary original civil jurisdiction of this court. Similar view has been taken by this court in Kantabai’s case (supra) where it was concerned with a will executed at Jalgaon in respect of property situate at Jalgaon.

15. In Bhawanji’s case this court has again reiterated the same view. In view of this, the view taken by the executing court that probate is required for the will in question is clearly erroneous. The learned Judge has proceeded on a wrong premise.

16. In this view of the matter, the impugned order

will have to be set aside. Hence the following order:

a) Order dated 28/4/05 passed by C.J.J.D. Ajra is set aside. However, the petitioner will have to pay requisite court fees if any court fees are due from him.

b) The executing court will hear the application afresh. The executing court shall give an opportunity of hearing to all parties and pass appropriate orders. The impugned order is set aside because the executing court has come to a wrong conclusion that the will in question requires probate. The question whether the legality of the will can be decided by the executing court and whether the petitioner's case comes under the scope of Section 47 of the Code of Civil Procedure because the petitioner's prayer for grant of the share under registered will of his father is necessary for discharge and satisfaction of the decree is kept open. All contentions of the parties are kept open.

c) It is clarified that this court has opined only on the question of requirement of probate.

d) Writ petition is disposed of in the aforestated terms.

(SMT. RANJANA DESAI, J.)

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